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No. 02-132

IN THE

Supreme Court of the United States

MOBIL CORPORATION AND HONEYWELL INTERNATIONAL INC.,

Petitioners,

v.

BRUCE W. ADKINS, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Appeals of West Virginia

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* THE ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF PETITIONERS

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MOTION OF THE ASSOCIATION OF AMERICAN RAILROADS FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Amicus curiae the Association of American Railroads ("AAR") respectfully requests leave of this Court to file the following brief in the above captioned matter. In support of its motion, AAR states as follows:

1. The petitioners have granted their consent in writing to the filing of this brief. Petitioners' written consent has been previously filed with the Court. However, respondents have categorically denied consent to all *amici curiae*, thus necessitating this motion. Respondents' written objections have also been previously filed with the Court.

2. AAR is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR's members operate approximately 75 percent of the rail

industry's line haul mileage, produce 93 percent of its freight revenues, and employ 91 percent of rail employees. In matters of significant interest to its members, AAR frequently appears before Congress, administrative agencies, and the courts on behalf of the railroad industry.

3. The constitutionality of West Virginia's special mass litigation rule, Trial Court Rule 26.01, see Pet. App. 36a-39a, is a matter of substantial concern to the AAR because a number of railroads are subject under the rule to mass trials in the West Virginia courts. Norfolk Southern Railway, Co. ("Norfolk Southern"), CSX Transportation, Inc. ("CSX"), Consolidated Rail Corporation, and American Premier Underwriters, Inc. (formerly known as Penn Central Corporation) have been named as defendants in more than 5,592 asbestos cases brought in the West Virginia state courts under the Federal Employer's Liability Act ("FELA"), 45 U.S.C. §§ 51-60. See, *e.g.*, *Norfolk S. Ry.* v. *Chief Justice Warren R. McGraw*, Civ. No. 2:01-1238, slip op. at 2 (S.D.W. Va. Aug. 12, 1999) (Memorandum Order). Because special considerations apply to FELA claims, which arise under federal law, these railroads will not be part of the same mass trial groups as petitioners Mobil Corporation and Honeywell International, Inc., who have been sued under various state-law theories. Nevertheless, the West Virginia courts have lumped the railroad FELA cases into their own mass trial group under Rule 26.01. See *State ex rel. Allman* v. *MacQueen*, 551 S.E.2d 369, 377 (W. Va. 2001) (per curiam) (using FELA cases as an example of the mass asbestos trial groups contemplated under Rule 26.01); *In re West Virginia Asbestos Personal Injury Litig.*, Civ. No. 01-C-9000, slip op. at 5 (W. Va. Cir. Ct. Kanawha County, Sep. 6, 2001) (Report of the Honorable Martin J. Gaughn) (report of the judge assigned to oversee the Rule 26.01's mass asbestos trials, stating that "it is anticipated that" trial in the railroad FELA cases "would begin on October 29, 2002."). Accordingly, the

railroads are equally subject to the unconstitutional prejudice arising out of the inherently unfair process of mass trials.

Since Rule 26.01 was adopted, the railroads have consistently challenged the rule's constitutionality (as both parties and amici) in the West Virginia state and federal courts. See, *e.g.*, *Norfolk S. Ry.* v. *Chief Justice Warren R. McGraw*, Civ. No. 2:01-1238, slip op. at 2.

4. AAR believes that its familiarity with the unique status of its members – who are defendants in the West Virginia state courts in asbestos cases arising under federal law – will aid in the Court's understanding of the issues presented in the Petition for Certiorari. In addition, railroad asbestos liability is governed by the FELA, and the AAR believes the Court should consider the special concerns that arise with application of Rule 26.01 to FELA claims.

Respectfully submitted,

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QUESTION PRESENTED

Because the cases pending in the West Virginia state courts against members of the Association of American Railroads arise under federal law, this brief's discussion is limited to the first question presented in the Petition for Certiorari.

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BRIEF OF *AMICUS CURIAE* THE ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE* [1]

The interests of the Association of American Railroads ("AAR") are set forth in the accompanying motion for leave to file as *amicus curiae*.

REASONS FOR GRANTING THE PETITION

Petitioners have made a compelling case that Rule 26.01 violates the fundamental tenets of the Due Process Clause and

[1] In accordance with Supreme Court Rule 37.6, *amicus* AAR states that no counsel for any party drafted this brief in whole or in part, and no persons or entities other than AAR made any monetary contribution to its preparation or submission.

conflicts with the precedents of this Court and federal courts of appeals. The constitutional problems for defendants facing asbestos claims under state law alone justify a grant of certiorari, but there are also special concerns in the application of Rule 26.01 to the adjudication of federal claims pending against the railroads in West Virginia. Several of the nation's major railroads have been named as defendants in more than 5,592 asbestos cases brought in the West Virginia state courts under the Federal Employer's Liability Act ("FELA"), 45 U.S.C. §§ 51-60. See *Norfolk S. Ry.* v. *Chief Justice Warren R. McGraw*, Civ. No. 2:01-1238, slip op. at 2 (S.D.W. Va. Aug. 12, 1999) (Memorandum Order). These concerns raised by Rule 26.01's effect on these federal claims underscore the need for immediate review.

Regardless of the number of defendants, any mass aggregation of the claims of unrelated asbestos plaintiffs under Rule 26.01 is inherently prejudicial. That prejudice is exacerbated in the context of negligence claims for asbestos injury arising from an employer's failure to warn or protect the employee, where the defense often depends on plaintiff-specific facts and complex medical and scientific evidence. Even apart from the patent unconstitutionality of Rule 26.01, this Court's FELA jurisprudence prohibits the application of state law procedures that unduly burden federal rights and defenses.

Moreover, given that the order denying the writ of prohibition is final, Pet. 27, and that trials conducted under the basic parameters of Rule 26.01 are structurally flawed and inherently prejudicial, there is nothing to be gained from delaying review. Because of the procedural advantages for plaintiffs in West Virginia courts and the hospitality given to mass occupational-exposure complaints even prior to Rule 26.01, railroads have been long forced into expensive and often unwarranted settlements of claims brought in West Virginia. Under Rule 26.01, the settlement pressure to avoid trials in which jury consideration of the evidence is

compromised, and appellate rights effectively extinguished, will be immense. Lawyers representing unimpaired or minimally impaired plaintiffs have advocated these procedures, not for purposes of justice, but because they are inherently unfavorable to defendants and create extreme settlement leverage. Since West Virginia is fast becoming the preferred forum for asbestos-related FELA claims against the major Eastern railroads, the prejudice stemming from Rule 26.01 will have an unusually large impact on the nation's FELA cases unless this Court grants immediate review.

I. MASS AGGREGATION OF CLAIMS IS CONTRARY TO THIS COURT'S DUE PROCESS AND FELA CASES.

A. Mass Trials Without Inquiry Into Commonality Of Claims Or Possible Prejudice Is Unlawful.

Generally the Due Process Clause permits state courts to apply nondiscriminatory and reasonable state-law procedures in adjudicating federal claims. See *Felder* v. *Casey*, 487 U.S. 131, 138 (1988). "By the same token, however, where state courts entertain a federally created cause of action, the 'federal right cannot be defeated by the forms of local practice.'" *Id.* (quoting *Brown* v. *Western Ry. of Ala.*, 338 U.S. 294, 296 (1949)). In fact, this Court has frequently intervened to prevent unreasonable local procedural rules from defeating the valid assertion of a federal right. See, *e.g.*, *Monessen Southwestern Ry.* v. *Morgan*, 486 U.S. 330, 336 (1988); *Felder*, 487 U.S. at 138-53; *Garrett* v. *Moore-McCormack Co.*, 317 U.S. 239, 245 (1942) (stating that, under the Supremacy Clause, state courts have a duty "to proceed in such manner that all the substantial rights of the parties under controlling federal law [are] protected").[2]

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[2] *See also Davis* v. *Wechsler*, 263 U.S. 22, 24 (1923) (rejecting a state court rule that an appearance waived a railroad's venue defense under federal law); *American Ry. Express Co.* v. *Levee*, 263 U.S. 19, 21 (1923) (holding that state rules regarding the burden of proof could not be applied

This Court's review is particularly appropriate in this case because thousands of the cases that are subject to Rule 26.01's mass trials are FELA claims. Enacted in 1908, FELA creates a federal cause of action in negligence for employees of interstate railroad carriers injured on the job: "[e]very common carrier by railroad ... shall be liable in damages to any person suffering injury while he is employed by such carrier ... for ... injur[ies] ... resulting in whole or in part from the [carrier's] negligence." 45 U.S.C. § 51; *Consolidated Rail Corp.* v. *Gottshall*, 512 U.S. 532, 541-43 (1994). The elements of a FELA cause of action are informed by common-law principles "'as established and applied in the federal courts'" unless those principles are altered by FELA's express statutory provisions. *Urie* v. *Thompson*, 337 U.S. 163, 174, 182 (1949); *see also Gotshall*, 512 U.S. at 543-44.

This Court has exercised special vigilance to ensure that state procedural rules (which may be applied in FELA) do not undermine the federal right. H.R. Rep. No. 60-1386, at 3 (1908) (noting Congress' purpose in enacting FELA was to "create uniformity throughout the Union" with respect to the financial responsibility of railroads for injuries to their employees). In *Garrett* v. *Moore-McCormack Co.*, this Court said that FELA must have "a uniform application throughout the country unaffected by local views of common law rules" and that "[t]his uniformity requirement extends to the type of proof necessary for judgment." 317 U.S. at 244.[3] In

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to "narrow[] the protection that the defendant had secured" under a federal law limiting railroad liability).

[3] *See also Dice* v. *Akron, Canton & Youngstown R.R.*, 342 U.S. 359, 361 (1952) ("[T]he federal rights affording relief to injured railroad employees under a federally declared standard could be defeated if states were permitted to have the final say as to what defenses could and could not be properly interposed to suits under [FELA]."); *Brown* v. *Western Ry. of Ala.*, 338 U.S. 294 (1949) (reversing a state court order that dismissed a FELA claim based on local pleading requirements because of the order's effect on national uniformity in FELA practice); *Baltimore & Ohio R.R.* v. *Mosele*, 368 N.E.2d 88, 96-97 (Ill. 1977).

accordance with this heightened focus on national uniformity, this Court has never hesitated to review state court rules that have attempted to streamline the state courts' dockets at the expense of FELA litigants. See, *e.g.*, *Monessen*, 486 U.S. at 336.

There can be no question that Rule 26.01 values efficiency over proper adjudication of FELA claims. Indeed, the West Virginia Supreme Court justified its action in promulgating and adopting Rule 26.01 by pointing to its perceived need to clean out the state courts' dockets. See *State ex rel. Allman* v. *MacQueen*, 551 S.E.2d 369, 371 (W. Va. 2001) (per curiam). To accomplish this judicial housecleaning, Rule 26.01 omits any inquiry into the commonality of the facts and issues to be decided among the plaintiffs and defendants who are to be thrown together for a mass trial. Although such an inquiry has traditionally been required in class actions, consolidations and joinders to ensure that the parties are able to present a meaningful case in a multi-party proceeding,[4] the West Virginia Supreme Court held that such traditional due process concerns do not apply in Rule 26.01 mass trials. See *id.* at 374.

Importantly, Rule 26.01's omission of a commonality inquiry is not premised upon an assumed similarity among the throng of plaintiffs in the thousands of state and federal asbestos cases pending in West Virginia. To the contrary, it is the breathtaking variety and complexity of those cases – the factual differences relating to the parties, their injuries, legal theories, and damages – that caused the West Virginia courts to throw in the towel. See *In re West Virginia Asbestos Personal Injury Litig.*, Civ. No. 01-C-9000, slip op. at 2 (W.

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[4] *See, e.g.*, *In re Repetitive Stress Injury Litig.*, 11 F.3d 368, 374 (2d Cir. 1993); *Malcom* v. *National Gypsum Co.*, 995 F.2d 346, 354 (2d Cir. 1993) ("While district courts need not perform any specific rituals or recite any incantations before ordering cases to be consolidated, they must, in every instance, consider whether the 'actions involv[e] a common question of law or fact.'") (alteration in original).

Va. Cir. Ct. Kanawha County, Sep. 6, 2001) (Report of the Honorable Martin J. Gaughn) ("because of the very complicated intertwining of plaintiffs' attorneys, multiple defendants and their defense attorneys, varying exposures to asbestos and different theories of liability, it is futile to continue to pursue small all-issue trials").

But the fact that West Virginia continues to attract the nation's asbestos cases cannot serve as a justification for abandoning the minimum requirements of an orderly and fair adjudication of every litigant's claims and defenses. The consequences of such an approach would be severe. Rule 26.01's lack of any meaningful commonality inquiry practically guarantees that the mass trials conducted under the rule will exceed the limitations of the trial court's resources and the jury's ability to comprehend the voluminous evidence and its connection (or lack thereof) to the differing claims and parties. In short, Rule 26.01 ensures that the most basic requirement of due process – the right to have one's individual claims and defenses heard and evaluated in a meaningful manner[5] – will not be met.

The conflict between Rule 26.01's mass trials and this Court's due process cases is amply demonstrated by the Court's recent decisions in *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815 (1999) and *Amchen Prods., Inc.* v. *Windsor*, 521 U.S. 591 (1997). In *Ortiz* and *Amchem*, this Court rejected class-action settlements reached on behalf of two vast classes of plaintiffs whose predominant (and perhaps only) commonality was that they had sometime, somewhere been exposed to some form of asbestos. See *Amchem*, 521 U.S. at

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[5] *See, e.g., Logan* v. *Zimmerman Brush Co.* 455 U.S. 422, 433 (1982) (noting that due process requires that an aggrieved party have "the opportunity to present his case and have its merits fairly judged."); *Mathews* v. *Eldridge*, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner'") (quoting *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965)).

624-27. The Court based these decisions on both the textual requirements of Federal Rule of Civil Procedure 23 and on the inevitable due process concerns that arise when litigants are deprived of an opportunity to have their claims and defenses presented, either personally or through a class representative that shares the represented parties' interests in the litigation. See *Ortiz*, 527 U.S. at 846-48; *Amchem*, 521 U.S. at 624-28. As this Court noted in *Ortiz*, it is "'our "deep-rooted historic tradition that everyone should have his own day in court."'" 527 U.S. at 846 (quoting *Martin* v. *Wilks*, 490 U.S. 755, 762 (1989), in turn quoting 18 C. Wright et al., *Federal Practice and Procedure* § 4449, at 417 (1981)).

Rule 26.01 deprives mass-trial litigants of their traditional "own day in court" in any meaningful sense. There can be no pretending that hundreds or thousands of litigants with dissimilar factual and legal claims and defenses will have an adequate opportunity to present their evidence and argument to a single finder of fact in any rational manner. This Court has noted the dizzying array of differences among asbestos plaintiffs, including the fact that they may have been:

> "exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods. Some ... suffer no physical injury or have only asymptomatic pleural changes, while others suffer from lung cancer, disabling asbestosis, or from mesothelioma .... Each has a different history of cigarette smoking, a factor that complicates the causation inquiry.
>
> "... [Non-symptomatic] plaintiffs especially share little in common, either with each other or with the presently injured [plaintiffs]. It is unclear whether they will contract asbestos-related disease and, if so, what disease each will suffer. They will also incur different medical expenses because their monitoring and treatment will depend on singular circumstances and individual medical histories."

Amchem, 521 U.S. at 624 (second omission in original) (quoting *Georgine* v. *Amchem Prods., Inc.*, 83 F.3d 610, 626 (3d Cir. 1996)).

Those factual differences are vividly illustrated just by the six asbestos plaintiffs in *Norfolk & Western Railway* v. *Ayers*, No. 01-963 (U.S. granted Apr. 1, 2002), a West Virginia FELA case in which this Court recently granted certiorari. Those plaintiffs worked at the railroad for anywhere between two and forty years, some as early as 1942. They all worked in different places and in different occupations, including office clerk, laborer, pipefitter, fireman, engine repairman, and ballast regulator. Their claimed exposures varied widely in intensity, constancy, and duration, with some lasting decades and another only three months. Most plaintiffs claimed exposure to a variety of dusts other than asbestos, such as silica, coal, and paint dust, each of which could be an alternative source of their claimed injuries. Three had asbestos exposure outside of railroad employment which was relevant to apportionment of causes. One of the plaintiffs did not smoke, whereas others had widely variable smoking habits which could affect the analysis of lung injury. They had varying medical conditions – such as emphysema, chronic bronchitis, chronic obstructive pulmonary disease, pneumonia, cardiovascular disease, and obesity – that affected both the diagnosis of asbestos injury, causation, and the degree of impairment. There were days of competing expert testimony on contested, complex medical evidence about the meaning and implications of each plaintiff's lung x-rays, breathing function tests, lung crackles, and medical histories. See generally J.A. at 365-524, *Norfolk & W. Ry.* v. *Ayers*, No. 01-963 (U.S. filed June 17, 2002).

For the most part, the factual distinctions noted in *Amchem* apply across the spectrum of FELA cases, and therefore the problems of coherently litigating a mass trial when the parties lack commonality will dominate every FELA-based proceeding under Rule 26.01. Moreover, for negligence

claims, the notion that any issue, including "fault," can be determined in a single trial as to a mass grouping of plaintiffs is wrongheaded. Railroads were not manufacturers of asbestos, but rather, used asbestos products, which they purchased from manufacturers, in some of their operations. While there are four defendants in the West Virginia asbestos litigation, each of them had several predecessor railroads – all separate, unaffiliated companies – operating during the relevant time periods. Thus, questions related to what, if anything, each of these railroad asbestos users might have known of asbestos hazards, and when they had such knowledge, are key to determining liability, and the answers may vary from plaintiff to plaintiff.

In addition, an employer's duty of care (which is commensurate with its ability reasonably to foresee a particular injury, *Gottshall*, 512 U.S. at 538) does not exist in the abstract; it is specific to an individual employee and depends on the geographic, temporal and physical characteristics of his work. In other words, whether the railroad was negligent in failing to protect an employee from asbestos exposure depends on the nature of the job; the nature and intensity of the exposure; what was known at the time of employment about asbestos risks; the balance of those known risks against the perceived unique insulation benefits of asbestos products in protecting workers from burns from high-temperature equipment; and what protective measures were available. In short, because Rule 26.01 requires FELA plaintiffs and defendants to present their cases to the finder of fact in concert with myriad others, each FELA litigant's "own day in court" will happen in nothing "more than a fictional sense." *In re Fibreboard Corp.*, 893 F.2d 706, 711 (5th Cir. 1990). This fictional right to be heard is inconsistent with this Court's due process jurisprudence.

B. Certiorari Is Warranted Because Rule 26.01 Undermines The Jury's Ability To Make Informed And Rational Decisions In FELA Cases.

The due process limitation on joinder of factually unrelated claims is not simply a formal construct of the law. Research studies of the jury process support the common-sense notion that in complex cases juries can not effectively adjudicate the factually disparate claims of more than a handful of plaintiffs in a given trial.

The prejudicial effects of the unprecedented mega-trials that Rule 26.01 contemplates can be grouped into several related categories:

1. Temporal And Physical Limitations On A Court's Ability To Hear Evidence

As petitioners set out in detail, the West Virginia Supreme Court's opinion actually contemplates asbestos trials involving thousands of largely unrelated parties. All of these litigants will have an independent interest and right to participate in the trial. All litigants will rightfully want to hear the evidence presented to the jury and to both rebut damaging evidence and present affirmative evidence relevant to their own claims or defenses. In short, it is not hyperbole to say that the trial will involve a huge mob of lawyers, witnesses and litigants.

Merely stating such a proposition unmasks the absurdity of Rule 26.01's approach. The proposed trial proceeding is inherently unworkable, even from a physical and temporal point of view. Even if the members of a jury possessed perfect powers of reason and recall, and even if the span of their effective attention were unlimited, they simply could not hear and see all of the litigants and evidence in the space and time that a court can reasonably provide for a single trial.

2. Human Inattention, Lack Of Comprehension And Forgetfulness

Jurors do not have perfect memories or analytic abilities, and their ability effectively to absorb information diminishes as the length and complexity of a presentation grows. In a study of juror performance, the A.B.A. Section of Litigation concluded that longer trials impair a jury's ability to comprehend the information presented. See Special Comm. on Jury Comprehension, *Jury Comprehension in Complex Cases*, A.B.A. Sec. Lit. Rep. 25, 32 (Dec. 1989) ("The volume of the evidence received at trial has a direct impact on the degree and quality of jury comprehension.... In addition, the longer the trial, the greater the risk that jurors will become bored and that their attention will diminish."). Chief Justice Burger has also commented on the prejudicial effect of complex and lengthy jury presentations. The:

> common sense of the common man ... cannot be brought to bear unless there is comprehension of the facts and the law....
>
> Even Jefferson would be appalled at the prospect of a dozen of his yeomen and artisans trying to cope with some of today's complex litigation in trials lasting many weeks or months.

Warren E. Burger, *Can Juries Cope with Multi-Month Trials?*, 3 Am. J. Trial Advoc. 449, 451 (1980).

3. Evidentiary Spillover

A further limitation on effective jury service in a Rule 26.01 mass trial is jurors' documented susceptibility to evidentiary "spillover" in lengthy, multi-party or multi-claim trials. The "spillover effect" refers to the jury's tendency to apply evidence in voluminous or lengthy cases to parties and/or claims to which the evidence does not pertain. Studies

have shown that this spillover effect results in higher rates of confusion of evidence and conviction in criminal cases.[6]

In the context of civil litigation, research has similarly demonstrated that while jurors are relatively adept at allocating blameworthiness and making differentiations among litigants in cases where the volume of evidence to be digested in a given time is low, as the evidentiary volume increases, the jury is less and less able to make distinctions of blameworthiness among the parties and claims. See Irwin A. Horowitz et al., *Effects of Trial Complexity on Decision Making*, 81 J. Applied Psychol. 757, 762-63 (1996).

Courts have also recognized the problem of evidentiary spillover when multiple parties or claims are involved in a single trial. For example, in *Baker* v. *Watermann S.S. Corp.*, 11 F.R.D. 440 (S.D.N.Y. 1951), the court determined that consolidation of two cases arising from the same explosion was improper because:

> [t]he nature and extent of the injuries sustained by the plaintiff in each separate action and the period of disability are different. No matter how carefully a jury were instructed as to the separate consideration of the damages of each plaintiff, there is a chance that the jury, after listening to evidence as to pain, suffering and injury of the two plaintiffs may be influenced, subconsciously perhaps, by the more serious injuries of the one plaintiff in reaching its verdict on the case of the other.... A paramount consideration at all times in the administration of justice is a fair and impartial trial to all

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[6] *See* Edith Greene & Elizabeth F. Loftus, *When Crimes are Joined at Trial*, 9 Law & Hum. Behav. 193 (1985); Sarah Tanford & Steven Penrod, *Biases in Trials Involving Defendants Charged with Multiple Offenses*, 12 J. Applied Soc. Psychol. 453 (1982); Irwin A. Horowitz et al., *A Comparison of Verdicts Obtained in Severed and Joined Criminal Trials*, 10 J. Applied Soc. Psychol. 444 (1980).

> litigants. Considerations of time, money and convenience must yield thereto.

Id. at 440-41; see also *Bradford* v. *John A. Coleman Catholic High Sch.*, 488 N.Y.S.2d 105, 106 (N.Y. App. Div. 1985) ("Plaintiffs were injured in two separate incidents, and each alleges that his or her injury was caused by similar acts of negligence by defendant's employees. Presentation of both claims to the same jury would tend to bolster each claim, to defendants' disadvantage.").

Of course the plaintiffs' bar is aware of these studies and of the coercive threat created by the potential of jury confusion. For them, Rule 26.01's "conjoinder" is not solely for judicial efficiency: they also seek to claim the advantage of a greater likelihood of favorable verdicts due to jury confusion and exhaustion. The plaintiffs' bar in West Virginia promotes these procedures because they favor the vast majority of asbestos plaintiffs: namely, the mildly impaired and those with highly controvertible evidence of asbestos injury. Evidence that one worker has mesothelioma or asbestos-related lung cancer will tend to plant the idea in the jury's mind that the railroad was broadly negligent, even if the exposures are entirely unrelated in time, place, or manner. The presence of truly injured plaintiffs will color the jury's view of the claims of marginally impaired plaintiffs that their injuries are medically attributable to asbestos, and will tend to enhance in jurors' minds arguments for higher damages, including emotional distress damages. With hundreds of claims to be evaluated in one truncated proceeding, the only hope that defendants have of achieving some individualized resolution of their cases and avoiding prejudicial spillover is to seek a pretrial settlement, which (with the threat of a mass trial hanging over defendants), will obviously come at a premium.

II. IMMEDIATE REVIEW IS NECESSARY TO PREVENT FUNDAMENTALLY UNFAIR PROCEEDINGS AND SIGNIFICANT PREJUDICE TO THE APPELLATE PROCESS.

As the foregoing discussion illustrates, Rule 26.01's mass trial mechanism is so fraught with prejudice that there can be no question of individual litigants obtaining a "meaningful opportunity to be heard," *Boddie* v. *Connecticut*, 401 U.S. 371, 377 (1971), at their """own day in court."""" *Ortiz*, 527 U.S. at 846. Accordingly, this Court need not – and should not – wait to review the constitutionality of Rule 26.01.

A. Immediate Review Is Warranted Because Rule 26.01's Mass Trial Procedure Is Structurally Flawed.

In the criminal context this Court has recognized that some procedures are so inherently unfair that they constitute a structural error in the trial process. See, *e.g.*, *Johnson* v. *United States*, 520 U.S. 461, 468-69 (1997); *Arizona* v. *Fulminante*, 499 U.S. 279 (1991). A structural error is a "defect affecting the framework within which the trial proceeds" that is so inherently prejudicial that the "'trial cannot reliably serve its function." *Arizona*, 499 U.S. at 310 (quoting *Rose* v. *Clark*, 478 U.S. 570, 577-78 (1986)).

This Court should grant immediate review because Rule 26.01's shortcomings are analogous to the defects this Court has declared to be structural error. See, *e.g.*, *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993) (erroneous reasonable-doubt instruction structural error because it invalidated all of the jury's findings); *McKaskle* v. *Wiggins*, 465 U.S. 168, 177 n.8 (1984) (denial of the right to self-representation at trial); *Waller* v. *Georgia*, 467 U.S. 39 (1984) (denial of the right to a public trial). The problems with Rule 26.01's approach are not dependent on the procedural history, trial record or facts of a particular case. Rather, a mass trial of unrelated and conflicting claims is innately prejudicial in all cases for the

same basic reason: it deprives litigants of the right to meaningfully present their claims and defenses to the trier of fact.[7] Without such a presentation, it is impossible to secure a remedy that is appropriate in light of each case's unique circumstances. In short, delaying this Court's review will only result in the unnecessary infliction of constitutional harms.

B. Rule 26.01 Has The Purpose And Effect Of Forcing Defendants To Unfairly Surrender Their Rights Without Trial.

Moreover, this Court should grant immediate review because Rule 26.01's coercive effect will insulate many unconstitutional deprivations of due process from appropriate appellate review.

As the Petition for Certiorari and the West Virginia Supreme Court's decision below suggest, over the past few years West Virginia has become a haven for the nation's asbestos litigation. See *State ex rel. Appalachian Power Co.* v. *MacQueen*, 479 S.E.2d 300, 303 (W. Va. 1996) (noting the extraordinary volume of asbestos-related actions filed in West Virginia). The fact that the state has become the jurisdiction of choice for asbestos plaintiffs is amply demonstrated by Justice Maynard's concurring opinion in the case before the Court. According to Justice Maynard, in the approximately 8,000 state-law cases currently grouped for mass trial under Rule 26.01, "as many as five thousand of the plaintiffs ... are

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[7] In delineating the right to represent oneself at a criminal trial, this Court has recognized "that the right to speak for oneself entails more than the opportunity to add one's voice to a cacophony of others." *McKaskle*, 465 U.S. at 177. Given that this statement was intended to describe the potential for "confus[ing] the message the defendant wishes to convey" when a single standby counsel adds his voice to that of a single defendant, *see id.*, it is not hard to imagine the jury confusion that will result if numerous counsel are each given an opportunity to address the jury regarding an array of factually dissimilar issues.

not West Virginia residents and were never exposed to asbestos in [the] State." Pet. App. 21a.

This phenomenon applies equally to asbestos cases brought under FELA. For example, in a recent asbestos-related case filed against CSX, only 177 out of 917 plaintiffs were residents of West Virginia. Complaint, *Abbott* v. *CSX Transp., Inc.*, No. 01-C-162M (Marshall County Cir. Ct. W. Va. Aug. 1, 2001). In a similar asbestos-related action brought against Norfolk Southern, only 15 of 365 plaintiffs were residents of West Virginia. Complaint, *Adkins* v. *Norfolk S. Ry.*, No. 01-C-183(1-365) (Brooke County Cir. Ct. W. Va. Sept. 13, 2001). The railroads estimate that, in the nearly 6,000 FELA cases pending in West Virginia, approximately 70% of the plaintiffs have no connection whatsoever to the state. These FELA plaintiffs hail from at least eighteen different states.

The reason for this remarkable trend is clear: the plaintiffs' lawyers (who principally represent substantial numbers of asbestos plaintiffs with few or no symptoms of disease) have pressed for procedures and rules that facilitate favorable settlements for their clients. As Justice Maynard stated in his concurrence, out-of-state plaintiffs "migrate[] [to West Virginia] because of the asserted pro-plaintiff bias with which Mobil claims [the] State handles asbestos litigation." Pet. App. 21a. It is clear that the substantive attraction of West Virginia tort law is a factor,[8] but that would not explain the

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[8] *Blankenship* v. *General Motors Corp.*, 406 S.E.2d 781, 786 (W. Va. 1991) (in the litigation of vehicle crashworthiness cases under theories of product liability, whenever there is a split of authority in other jurisdictions on an issue about which this court has not yet spoken, the trial court should presume that we would adopt the rule most favorable to the plaintiff); *Bower v. Westinghouse Elec. Corp.*, 522 S.E.2d 424, 430 (W. Va. 1999) (medical monitoring damages available for asbestos exposure); *Restatement (Third) of Torts: Apportionment of Liability* § 17 reporter's note at 151 (2000) (noting that West Virginia is one of only 14 states that has retained the pure form of joint and several liability, which

vast migration of FELA cases to West Virginia. Those cases come for the procedural advantages the state offers. West Virginia juries are notoriously inclined to large verdicts. Summary dismissal is generally disfavored in West Virginia state courts, so even if a defendant can distinguish frivolous from facially plausible claims based on the pleadings, the defendant may be unable to obtain dismissal of the frivolous suits. Moreover, West Virginia's two-tiered court system provides defendants no right of appellate review in negligence cases, see, *e.g.*, W. Va. R. App. P. 3, 7, and the elected West Virginia Supreme Court of Appeals frequently declines discretionary review to corporate defendants. Railroads, which have been subject to mass complaints in the West Virginia courts for years and trials where their defenses were prejudiced by the improper joinder even of small numbers of factually distinct asbestos plaintiffs, have routinely been forced to settle thousands of truly meritless claims for substantial sums because of the hydraulic pressure of the West Virginia court system.

But the settlement pressures created by these more traditional pro-plaintiff rules pale in comparison to the effects of Rule 26.01. The railroads' experience is that (consistent with the jury research discussed above), trials involving numerous plaintiffs result in damages awards that are skewed towards the most seriously injured plaintiffs while less severely injured (or even uninjured) plaintiffs obtain windfall verdicts. Accordingly, the *in terrorem* effect of a "trial" that will potentially assign billions of dollars in liability based on thousands of claims (without an opportunity for an individualized defense) cannot be overstated. See *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (noting that the threat of runaway liability in mass tort actions pressures defendants to settle even meritless claims); Henry J. Friendly, *Federal Jurisdiction: A General View* 120

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makes every defendant 100% liable for a plaintiff's injuries regardless of the percentage of fault attributable to each defendant).

(1973) (calling class-action settlements induced by the chance of an enormous verdict "blackmail settlements"). Because of these abnormal pressures, any delay in this Court's review will force many litigants to surrender their constitutional rights in exchange for a release from Rule 26.01's Wonderland procedures.[9]

C. Rule 26.01 Extinguishes Meaningful Appellate Review.

Even apart from the inherent prejudice to defendants' right to a fair trial, Rule 26.01 effectively extinguishes any possibility of a meaningful appeal. This Court knows that any good appellate brief winnows the issues for the reviewing court (and must do so all the more when, as in West Virginia, appellate review is discretionary). See, *e.g.*, *Smith* v. *Murray*, 477 U.S. 527, 536 (1986) (stating that the "process of 'winnowing out weaker arguments on appeal and focusing on' those more likely to prevail ... is the hallmark of effective appellate advocacy.") (quoting *Jones* v. *Barnes*, 463 U.S. 745, 751-52 (1983)). But with mass trials, a defendant would as a practical matter have to forego appeals entirely as to many plaintiffs. Furthermore, neither the West Virginia Supreme Court nor this Court is going to review all the specific judgments against defendants for individualized prejudice. Nothing is to be gained from delaying review until after trial in terms of sharpening the issues; resolution of the constitutionality of Rule 26.01 turns on whether the unprecedented mass trials it orders are inherently prejudicial, and that question is cleanly presented now. Moreover, the stark reality is that the evisceration of appellate review simply

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[9] Under the trial order implementing Rule 26.01, the jury is to select a punitive damages "multiplier" for cases arising under state law (FELA does not authorize punitive damages, *Law* v. *General Motors Corp.*, 114 F.3d 908, 912 (9th Cir. 1997)), before determining liability. This evokes the mandate of the Queen of Hearts: "Sentence first – verdict afterward." Lewis Carroll, *Alice in Wonderland* 98-99, 110 (1923).

adds to the pressure to settle rather than play Russian roulette with the Rule 26.01 regime.

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Rule 26.01 fundamentally alters almost every aspect of FELA litigation, including: (1) the parties' interests in litigating or settling FELA cases,[10] (2) the evidentiary presentation required for a successful FELA trial, (3) the jury's role and competence in evaluating FELA claims, and (4) the ability of the parties and the courts to achieve meaningful appellate review. This Court is the final guardian of federal law. It cannot allow a state court to impose state-law procedural devices that deprive both plaintiffs and defendants of a meaningful opportunity to present their claims and defenses to the trier of fact.

West Virginia's crowded litigation docket will not be magically cured by making the state an even more attractive refuge for tort claims that have little or no connection to the state. Rather than solving a compelling judicial problem, Rule 26.01's system of packaging frivolous claims with those of the seriously injured and coercing a settlement for the entire group will only reward and encourage further forum shopping. It will also undermine the federal interests in due process and the orderly administration of FELA's federal common law. For these and the foregoing reasons, this Court's review is urgently needed.

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[10] While most FELA cases eventually settle before trial, those settlements are based on each party's ability individually to assess the strengths and weaknesses of its case and the costs and risks of going to trial. This typically leads to far more equitable settlements than could ever be obtained where, as here, defendants face the vast prejudice inherent in West Virginia's mass trial scheme.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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